No. 33.

By. opposing Petition for Rehea

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

CASE No. 16,724. TERM No. 33.

HARRY W. DICKERMAN, Trustee, ET AL.,
Petitioners,

vs.

THE NORTHERN TRUST COMPANY ET AL.,
Respondents.

MEMORANDUM AND AFFIDAVITS IN OPPOSITION TO PETITION FOR REHEARING.

LOUIS MARSHALL,
CHARLES A. DUPEE,
Counsel for Respondents.

C. G. Burgoyne, Walker and Centre Streets, New York.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

CASE NO. 16,724. TERM NO. 33.

HARRY W. DICKERMAN, Trustee, *et al.*,

AGAINST

THE NORTHERN TRUST COMPANY ET AL.

Respondents' Memorandum in Opposition to Petition for Rehearing.

The opinion affirming the decree of foreclosure was rendered on January 22, 1900. Since its rendition proceedings have been taken toward carrying out the terms of the decree, and arrangements have been made for entering ancillary decrees in the various States in which the mortgaged property is located.

At this late day a petition for a rehearing is filed, on the sole ground, as alleged, that this Court did not pass upon the first error assigned by the petitioner; "namely, that it was error for the Circuit Court to strike appellants' cross-bills from the files."

This proposition is argued in the petition for rehearing, and a remarkable novelty in procedure has been introduced in the form of *ex parte* affidavits made for the avowed purpose of procuring a modification of the decree of foreclosure and sale.

In view of the elaborate arguments which have already been presented to this Court, it is deemed unnecessary to indulge in a protracted argument for the purpose of demonstrating the error on which this new proceeding on the part of the petitioners is based.

The petitioners fully and elaborately discussed every proposition now urged in their petition for rehearing; and no reason is shown under the practice prevailing in this Court for a renewal of the argument, especially on matters of a most technical character and which involve no merits.

I.

The Court was justified in striking appellants' cross-bill from the files, not only because it was not germane to the original bill, and was a mere repetition of the answer, but also because it attempted to introduce into the records a large number of new parties, most of whom resided beyond the jurisdiction of the Court.

It is well settled that, in a bill to foreclose a trust deed, like that in this case, stockholders are not necessary parties, and they are allowed to become parties by leave of court only when some fraudulent conduct on the part of the bondholders, trustees or other parties is alleged to have occurred which could affect the rights of the trustees to foreclosure proceedings.

Thomas vs. Brownville R. R., 109 U. S., 526.

The Court below, upon application by petitioners, permitted them to become defendants and to answer,

no objection being made by respondents, upon the hypothesis that their answer might disclose a state of facts which would preclude respondents from enforcing the foreclosure of the trust deed, or which would allow it to be enforced only to a limited extent. Petitioners were merely an insignificant part of the stockholders and were not creditors. The theory of their answer was that all the bondholders had acquired stock of the company without payment therefor, or that they were assignees of the bonds with notice of all equities ; that they were indebted to the company for such stock, and that the Court should, in that action, ascertain such indebtedness and set off the same against the bonds. It is apparent that this was matter *in defense* of the action. This view has for obvious reasons been rejected by this Court.

On May 13, 1895 (Rec., 105), the Court gave petitioners leave to file answer and cross-bill. May 18, 1895, the answer of petitioners (Rec., 106) was filed ; on the same day the cross-bill was filed (Rec., 123). Among the defendants named therein were certain parties who, it was alleged, were holders of bonds, as well as stockholders. On January 21, 1886 (Rec., 314), the Court sustained respondents' motion to strike the petitioners' cross-bill from the files. On March 4, 1896, the Court overruled motion of petitioners to vacate the order dismissing their cross-bill (Rec., 325).

The motion to strike the cross-bill from the files rested on the ground that the interlocutory orders of a court of chancery are always under the control of the Court ; that if, on inspection of the cross-bill, it appeared that the matter set forth was not matter to justify a cross-bill, it was as fully within the power of the Court to strike the cross-bill from the files as it was to give leave to file it.

Forbes vs. Memphis R. R., 2 Woods, 323, was heard on motion to vacate an order allowing certain parties to intervene as defendants and to file answer and cross-bill. The Court says :

" The intervenors having, as the Court thought, presented a *prima facie* case, orders were made in accordance with their request. The complainant moved to vacate the order, and the question was raised whether the applicants should have been allowed to intervene."

The Court further said :

" It is questionable whether, in any case where a suit is properly instituted against a corporation, a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as a party to that suit, and seek to defeat or control the proceedings. An original bill would rather seem to be the proper mode of proceeding."

" And it is in the discretion of the Court whether or not to permit the stockholder to become a party defendant in any case where he is not made such by the bill, and as it is held to be an extreme remedy to be admitted by the Court with hesitation and caution, I think I ought not have allowed it in this case, and ought now to withdraw the order for such allowance. The orders for leave to intervene and file answers and cross-bills will be vacated."

Here the cross-bill was properly stricken from the files for the following reasons :

1. *The bill was not germane to the original bill.*

The original bill was filed by trustees to foreclose a mortgage executed by the sole defendant, the Columbia Straw Paper Company, to the trustees to secure $1,000,000. The cross-bill alleged a fraudulent overvaluation of property by the company and parties connected therewith as directors, stockholders, etc. It averred that the contract under which the bonds were issued was fraudulent and void, and alleged the invalidity of the bonds and mortgage. It also asserted a liability on the part of bondholders or some of them, as stockholders ; a liability which, if it existed, could only be enforced at the instance of creditors. The question of liability of stockholders could only be

settled in a suit to which all stockholders were parties, and in which all claims of all creditors could be adjusted. Such suit was not germane to a bill to foreclose a mortgage, and such relief could only be had by an independent proceeding.

Lund vs. Skanes Enskilda Bank, 96 Ill., 181.
Foster's Fed. Pr., Sec. 172.

A cross-bill, being an auxiliary bill merely, must be a bill touching matters in question in the original bill. If its purpose is different from that of the original bill, it is not a cross-bill, even though the matters presented in it have a connection with the same general subject.

Cross vs. De Valle, 1 Wallace, 1.

2. *The cross-bill is, in substance, the same as the answer; indeed, it is practically a verbatim copy thereof.*

It alleges, as does the answer of petitioners, the invalidity of the mortgage and the bonds. It asserts, as does the answer, a liability on the part of bondholders as stockholders, and insists that such liability be set off against the claims of such bondholders. Both the answer and the cross-bill admit that every bondholder, or his assignor, paid par for his bonds. The cross-bill prays for an accounting between original complainants and bondholders, which could be done only under answer, if at all. There is no lawful relief prayed for in the cross-bill which could not be fully availed of by way of the answer. It is elementary that in such case a cross-bill is not proper.

A cross-bill setting up no defense except what could be set up by answer will be dismissed.

Am. Co. vs. Marquans, 62 Fed. Rep., 660.

Where the right claimed by a defendant exists simply in excluding the plaintiff from the right asserted by the latter, of course, there is occasion for a cross-bill.

1 Foster's Fed. Prac., Sec. 171 (p. 188).

A cross-bill never should be brought where parties can obtain in the original suit the relief sought for by the cross-bill.

2 Daniels' Chan. Pr., p. 1551.

And where it appears to the Court, from an inspection of the answer and cross-bill, that all the relief to which the defendants are entitled under their cross-bill is available upon answer, the proper practice is to vacate the order allowing the cross-bill to be filed, and to strike the same from the files.

3. *The cross-bill improperly attempted to bring new parties into the suit. This cannot be done.*

Ever since the decision by this Court in *Shields vs. Barrow, 17 How. (U. S.) 145*, there has been no doubt as to this proposition.

In that case Mr. Justice CURTIS said:

"'A cross-bill, *ex vi terminorum*, implies a bill brought by a defendant against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill' *(Story Eq. Pl., Sec. 389; 3 Dan. Ch. Pr., 1742).*

"New parties cannot be introduced into a cause by a cross-bill. If the plaintiff desires to make new parties he amends his bill and makes them. If the interest of the defendant requires their presence, he takes the objection of nonjoinder and the complainant is forced to amend or his bill is dismissed. If, at the hearing, the Court finds that an indispensable party is not on the record it refuses to proceed. These remedies cover the whole subject, and a cross-bill to make new parties is not only improper and irregular, but wholly unnecessary."

In "*The Dove*," *91 U. S., 385*, Mr. Justice CLIFFORD said:

"New and distinct matters, not included in the original bill or libel, should not be embraced in the cross-suit, as they cannot be properly examined in such a suit, for the reason that they constitute the

proper subject matter of a new original bill or libel. Matters auxiliary to the cause of action set forth in the original bill or libel may be included in the cross-suit and no others, as the cross-suit is, in general, incidental to, and dependent upon, the original suit."

Shields vs. Barrow, supra, is cited with approval in *Randolph vs. Robinson, 20 Fed. Cases,* p. 262, where Mr. Justice NIXON dismissed a cross-bill, said, among other things:

"2nd. It brings in new parties, which is not admissible *(Shields vs. Barrow, 17 How. [58 U. S.] 130).* 3rd. It introduces new and distinct matters not embraced in the original bill *(Ayres vs. Carver, 17 How. [58 U. S.] 595.* 4th. Its purpose is different from that of the original bill. The latter concerns the infringement of a patent, and the former is in the nature of a creditor's bill seeking to set aside a fraudulent transfer of property, and aiding in the collection of a judgment *(Cross vs. De Valle, 1 Wall. [68 U. S.] 1).*"

In *Adelbert College of Western Reserve University vs. Toledo, &c., R. Co., 47 Fed., 846,* Mr. Justice JACKSON said:

"The cross-petition, filed by Redmond and others, introduced new parties, and changed the character of the original suit in that it was made a general bill or proceeding on behalf of all holders of equipment bonds. As the state court permitted this, it may be assumed to be in accordance with the local law, though it violated the well-settled rule of chancery practice and pleading that a cross-bill should not introduce or make new parties *(Shields vs. Barrow, 17 How., 145; Odom vs. Owen, 2 Bart., 446; McGavock vs. Morrison, 3 Tenn. Ch., 355).*"

In *Gregory vs. Pike, 67 Fed., 845,* Mr. Justice PUTNAM said:

"In the way attempted in the present case, there are no pleadings on behalf of the original plaintiff as against Kemp Van Ee, and could be none. The whole basis of making him a party defendant was in the allegations of Swift's answer. This practice, although

prevailing in some localties, is condemned, by necessary implication, in *Shields vs. Barrow, 17 How., 130, 145*, by Justice BRADLEY, in 1897; in *Searles vs. Railroad Co., 2 Woods, 621, 625*, by Justice BLACHFORD, in *Drake vs. Goopridge, 6 Blatchf., 151*, and in the notes to *Daniell, Ch. Prac. (6th Am. Ed)., 286, 287.*

"Some of the reasons for this are highly meritorious, other technical—meaning, not technical in the narrow sense of the word, but in its better sense.

"FIRST. Complainants ought not to be compelled into litigation with parties not of their own seeking. One may commence a proceeding very simple in its nature, and be content to take the risk of it; but, if other persons can force themselves into the litigation what he conceives to be simple may become complicated, expensive and interminable.

"SECOND. There are ample remedies in case the plaintiff fails to unite all parties required to do equity, either by a bill of interpleader, or in the methods pointed out by Judge CURTIS, in *Shields vs. Barrow.* Therefore, there is no occasion to resort to the extraordinary proceeding of making new parties without complainant's consent.

"THIRD. As already said, a case made up as this was, presents no proper issue on which to base proofs for the determination of the court. This is not technical in the narrow sense of the word, but leads to extraordinary results as will be seen by reference to the next paragraph.

"FOURTH. The result which may come from bringing in a defendant, as was done in this case, shows the impropriety of it. A defendant thus brought in answers, and complainant refuses to file a replication. The only remedy is for the defendant to move a dismissal as against himself. The result is that he is dismissed from the case, and the case stands exactly as it did before he was brought in. Thus, by failing to reply, the plaintiff is able to bring the bill into its original state. It cannot be said that this can be avoided by setting down the case to be heard on bill and answer, because, as already said, there are no proper allegations on behalf of the new defendant which would enable this to be effectually done."

In *Thurston vs. Big Stone Gap Co., 86 Fed., 484*, Judge SIMONTON said:

"The complainant and defendant unite in a motion to dismiss the cross-bill as improperly filed by a stranger to the cause. There can be no doubt that a cross-bill is the nature of a defense, and can only be filed by one party to the cause. 'A cross bill' says *Mr. Daniell (Ch. Prac [3d Am. Ed., Perkins] 1649)*, 'is a mode of defense. The original bill and the cross-bill are but one cause. It must be confined to the subject matter of the original bill, and cannot introduce new and distinct matters not embraced in the original suit; and, if it do so, no decree can be founded on those matters.' So, also, *Story, Eq. Pl.*, Section 389: 'A cross-bill *ex vi terminorum* implies a bill brought by a defendant against the plaintiff in the same suit, or against other defendants, or against both, touching the matters in question in the original bill.'"

The Court then cites the language from *Shields vs. Barrow, supra*, which has already been quoted.

In *Richman vs. Donnell, 53 N. J. Eq., 35*, Vice-Chancellor BIRD said:

"The question still remains, can this cross-bill be so amended by introducing Thomas and E. Samuel Dougherty as parties defendant thereto, and the question involved be litigated in the present proceedings? This must be answered in the negative. If the complainant has failed to make all the persons interested parties, the defendant has his remedy by proper leading; that is, by demurrer, or notice of motion to strike out for want of proper parties. If the interests of the defendant be such that it is necessary for him to raise issues not within the scope of the complainant's bill, but which are essential to the establishment of his rights, and to that end new parties must necessarily be brought into the litigation, he can raise such issues by filing an original bill. *Shields vs. Barrow, 17 How., 129, 144, 145.* The motion to strike out the cross-bill should prevail with costs."

To the same effect are

Ladner vs. Ogden, 31 Miss., 340.
Bishop vs. Miller, 48 Miss., 369.
Comfort vs. McTeer, 7 Lea, 662.

Shields vs. Barrow (supra) was recognized as authority in the opinion of Mr. Justice HARLAN, in *Hardin vs. Boyd, 113 U. S., 764*, and that case must be considered as establishing the orderly rule of procedure which must prevail on the chancery side of the Federal Courts, notwithstanding the attack made upon it in the petitioner's brief.

Here the Northern Trust Company filed its bill for foreclosure. The Columbia Straw Paper Company, the mortgagor, practically admitted the allegations of the bill. The petitioners were allowed to answer as intervenors. Being thus permitted to answer on behalf of the corporation, they could only litigate such matters as the mortgagor might litigate as against the mortgagee. Equity Rule 94 would apply to them. Yet there has been no compliance with its provisions.

Not content with the leave to answer, the petitioners attempted, by way of a cross-bill, to bring into Court various bondholders and stockholders of the Columbia Straw Paper Company, many of whom resided beyond the jurisdiction of the Court in which the foreclosure suit was pending, for the purpose of conducting against them an independent litigation, in which the bondholders, as a class, and the respondent had no possible interest. On reflection the Court below recognized the impropriety of such a course. The grievance to which the petitioners are now reduced is that the Court, in the exercise of its discretion, decided that it would not permit the rights of the bondholders to be prejudiced and delayed and their security rendered precarious, by injecting into the litigation matters not at all germane to those set forth in the original bill, through the medium of new and unnecessary parties, with whom the petitioners can fully litigate in an independent action on proper pleadings and under conditions which will not embroil the complainant, which has no possible interest in the controversies which the petitioners thus seek to manufacture.

No legitimate purpose could have been promoted by permitting the cross-bill to stand.

On their own showing the cross-complainants were not entitled to any affirmative relief.

If the relief they sought was to affect the validity of the bonds and mortgage, and to prevent their enforcement, plainly no cross-bill was necessary.

If the object was to establish a stock liability against the owners of some of the bonds, the bill was not conceived for that purpose; nor under the laws of New Jersey relating to corporations, could such bill be filed without bringing in all stockholders as well as creditors.

If the object was to make stockholders and officers liable for fraud, such object could only be attained in an original and independent proceeding and in an action at law and not in a suit in equity.

If the object was to make any of the stockholders or bondholders liable as promotors, that could only be done in an independent action.

It is evident that this Court did not overlook the assignment of error on which the petitioners are relying on this application for a rehearing. In fact, the opinion of Mr. Justice BROWN, proceeding on the assumption that the pleadings raise the question which the petitioners sought to inject into the litigation by their cross-bill, says:

"It is difficult, however, to see how justice can be done by a reversal of the decree appealed from. This is a decree ordering a foreclosure and sale of the property to pay the bonds, to which the bondholders are clearly entitled. It finds that all the bonds were duly issued, negotiated and sold, and that they are outstanding and valid obligations of the company, and that they are now held by a large number of persons who have become the owners thereof for a valuable consideration. These bonds must ultimately be presented for redemption from the proceeds of sale, and we see nothing in the decree appealed from to prevent an inquiry being instituted as to their validity in the hands of their present holders. We are clearly of

opinion that, so far as they were purchased for a valuable consideration by innocent holders, they are not subject to the set-off claimed. The question whether, so far as they are held by parties cognizant of the alleged fraud, they are subject to a set-off, is not one which properly arises in this case, *where the bonds must be treated as an entirety*, but is a defense applicable to each individual bondholder. Whether the corporation, or those who sue in its behalf, may hold them liable for the par value of the stock or are confined to a rescission of the transaction, is a question upon which we express no opinion."

II.

There is no foundation for the claim of the petitioners that the mill-owners were fraudulently deprived of stock to which they were entitled or that there is a difference of $2,113,000 between the amount paid by Stein for the mill properties purchased by him, and the amount of stock which he received therefor.

The case was tried by the respondents on the theory that the only real issue in the case was as to whether a decree of foreclosure and sale should be rendered in favor of the bondholders as a class.

The validity of the bonds being admitted, a decree of foreclosure would necessarily follow.

The petitioners called as witnesses Emanuel Stein, J. B. Sherwood and Henry M. Wolf, and attempted, in a measure, to give a history of the organization of the Columbia Straw Paper Company.

The respondents, taking the view which has been sustained by the opinion of this Court, went into no

proof as to these matters, called no witnesses, believing that to do so would unnecessarily encumber the record and lead to delay injurious to the bondholders. In other words, the respondents demurred to the petitioners' testimony. That view was sustained by Judge SHOWALTER, by the Circuit Court of Appeals and by this Court.

Had the respondents deemed it important to go into proof it would have been demonstrated that the testimony of Sherwood, who admitted that he had stirred up this litigation for the purpose of coercing the bondholders to pay him $25,000 for his stock, in so far as he claimed that it was ever contemplated that 70 mills should be united, was utterly false. It could have been shown by written instruments emanating from him that it was never claimed or contemplated that more than 42 mills should be combined, that the mill-owners received all the stock and cash for which they stipulated, and that they were fully cognizant of all the conditions under which the Straw Paper Company was organized. In fact, the testimony which appears on the record in the case of *See vs. Columbia Straw Paper Company*, in the New Jersey Court of Chancery, has abundantly established this proposition.

Moreover, the testimony of the petitioners' witnesses clearly indicates that there never was a difference of $2,113,000 between the amount paid by Stein for the mills purchased and the amount received by him from the Straw Paper Company. This clearly appears from the following statement, which is verified by the record in this case:

The company issued to Stein in stock and bonds $5,000,000. Against this he made the following disbursements:

He delivered into the hands of a trustee for the company (Rec., 571 and 552) stock	$357,200 00
He paid mill men, according to agreements, cash	766,000 00
Preferred stock	629,000 00
Common "	1,258,000 00
Notes (Rec., 595, 403)	185,000 00
He paid cash into the treasury (Rec., 401)	200,000 00
" " " for organization expenses (Rec., 492)	50,000 00
" " Sherwood (Rec., 381) in stock	25,000 00
" delivered with the bonds	600,000 00
He paid additional cash (Rec., 396)	20,000 00
" " " " Defiance Mill	5,000 00
" " expenses (Rec., 557)	7,000 00
" " " (Rec., 293)	1,500 00
" " to Dupee, J. W. & W., stock for examination of titles (Rec., 554) and other services connected with the consummation of the deed	34,800 00
	$4,138,500 00

This left in his hands but $861,500 in the capital stock of the company.

He also paid commissions for selling bonds; charges of New York lawyers for services in connection with the option and other contracts and in connection with their execution.

He also paid additional sums for the Clarksville mill, taxes, insurance and other charges (Rec., 577); also additional for Whitewater, a considerable amount of cash and stock (Rec., 579); also additional charge for Lawrence mill (Rec., 580); various other payments (Rec., 581); recording fees (Rec., 593); and expenses in the procuring of options (Rec., 593); increases in price of Richardson Paper Co. (Rec., 577); same in case of

Massillon mill (Rec., 579); also traveling expenses of himself and agents. The foregoing disbursements are, for the most part, not stated in detail, but they show that the amount of $861,500 should be very largely reduced. And this balance he received for his compensation in common stock. No attempt was made by *petitioners* to ascertain his disbursements beyond what is shown above.

In addition to these facts the record shows that very shortly after the organization of the corporation it became insolvent. Its mortgage has been foreclosed because of its inability to pay the interest on its bonds. It also shows that the stock, which Stein and others are charged with having divided among themselves, in fraud of the mill-owners, was never parted with by them. How, then, could they, by any possibility, have profited from this stock? On the contrary, it can be demonstrated that they have lost vast sums of money by reason of their connection with the corporation, and that, instead of being guilty of a fraud, they have been sufferers through the machinations of the very men who are now leading in the attack made upon them.

The bad faith of the petitioners is apparent from the fact that while in one breath they claim to have been defrauded of a thing of value, because the so-called promoters withheld from them stock which they should have received, in the very next breath they assert that the stockholders are accountable to the corporation for the full value of the stock because it was issued on a fraudulent over-valuation of the mills, and that the stock represented no value.

In fact the mill owners are the only persons who in any way profited through the organization of the Columbia Straw Paper Company, since they received $800,000 in cash for mills which, when sold, will probably yield but an inconsiderable fraction of that sum, and which, during the progress of this litigation, have been and still continue to be a burden instead of a source of revenue.

III.

Although it is believed that this Court cannot consider affidavits on an application of this character, the respondents have deemed it proper to contradict and explain those which have been presented by the petitioners, for the purpose of showing that there is no reason for modifying the decree of foreclosure herein.

If there ever was a case in which a speedy sale is necessary, this is such a case.

The record itself shows a case of absolute insolvency. The fact that Receiver's certificates have been required, and that the debt of the Receiver has been growing, likewise establishes a potent reason for prompt action.

The affidavits of the respondents indicate additional reasons for expedition. The fact that the property is not earning operating expenses; that the Receiver's claims for services and disbursements are accumulating; that even after sale a fifteen-months period of redemption must expire before title can become perfected in a purchaser; that the present is the most favorable time for an advantageous sale; that the property is deteriorating in value; all indicate that the interests of the bondholders demand that the property shall be disposed of at once.

The litigation has now been progressing for more than five years. Whatever the property may have been worth when the company was organized or when the litigation was commenced, it has been rapidly depreciating in value ever since. The straw-paper industry has during that time been practically destroyed, and a new industry has arisen in its stead.

But even if there is a temporary revival in the straw-paper trade the bondholders should have the benefit of it by being enabled to have a sale take place while it lasts. That slender hope should not be dissipated by once more plunging them into a litigation in which they have no interest, for the benefit of an individual like Sherwood, who, by his own admission, has come into court impelled by motives of the basest character, and who is still apparently egging on this litigation by bolstering it with such an affidavit as he has presented on this hearing.

In it he alleges, *on information and belief*, that an underwriting agreement whereby $2,113,000 of surplus stock was obtained, has been exhibited to *and seen by parties* in the City of Chicago, Illinois, since the 22d day of January, 1900. He does not say by whom. He does not pretend to have seen it. He does not name his informant. His assertion is, however, absolutely contradicted by the affidavit of Mr. Wolf.

The trial Court, having full knowledge of the condition of the property, the local law regulating foreclosure sales, and the necessities of the situation, made a decree which amply protects everybody interested in the property, and there is no reason why that decree should be disturbed by this Court on the showing which the petitioners have attempted to make extrinsic of the record, and which is completely answered by the respondents' affidavits.

For the same reasons, it would be at this time not only unwise, but absolutely injurious to all interests to provide in the decree for a minimum price at which the property must sell.

As the decree now stands, anybody who is interested in the property can bid at the sale. Competition is open. The petitioners have the same opportunity of buying as the bondholders. All the world may appear and bid.

There is nothing before this Court which would enable it to state what the minimum price should be.

Any attempt to fix it might result in injustice. If fixed at too high a sum it might become necessary to once more apply to the Court for a reduction. If fixed at too low a figure it might have the effect of depreciating the value of the property.

The Court under whose direction the sale is to take place has full power in the premises, and better facilities for determining what would best inure to the advantage of all persons interested in the property to be sold, than this Court.

To ask this Court, which has acquired jurisdiction of this cause by a writ of *certiorari*, to regulate the minutiæ of a judicial sale, is to lose sight of its true purposes and functions.

IV.

It is respectfully submitted that the petition for a rehearing should be denied.

LOUIS MARSHALL,
CHARLES A. DUPEE,
Respondents' Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 33. OCTOBER TERM, A. D. 1899.

HARRY W. DICKERMAN, Trustee, *et al.*

vs.

THE NORTHERN TRUST COMPANY ET AL.

Writ of *Certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit.

STATE OF ILLINOIS, } ss.:
County of Cook, }

WILLIAM D. HOLLIS, being first duly sworn, upon his oath says that he is a resident and citizen of the City of Chicago, in the State of Illinois. That for more than twenty years last past he has been continuously engaged in the business of selling wrapper paper of all grades and descriptions at wholesale, and since the year 1881 he has been the senior member of the firm of Hollis & Duncan, wholesale dealers in wrapping paper and paper bags, located in the City of Chicago and doing business throughout the country, and that during the same period this affiant's said firm has been engaged as agents of various mill-owners and manufacturers of straw wrapping paper located in various parts of the United States.

This affiant further says that he is thoroughly acquainted with the business of manufacturing, buying and selling straw wrapping paper, and that he knows the industry and trade intimately.

This affiant further says that while it is a fact that the price of straw wrapping paper, after the panic of 1893, diminished in the open market to about $16 per ton, it is also a fact that the price of labor, fuel, lime, acids and straw (all of which enter into the manufact-

ure of straw paper) were lower then and for a number of years succeeding than they have been at any time since; that recently the price of all of the materials that enter into the manufacture of straw wrapping paper, and all supplies that are used in and about straw wrapping paper mills, have increased in value; that during the past year there has been a shortage of straw in the vicinity of the mills and as a consequence the price of straw has within the past few months advanced so that it is now almost double what it was a year ago, and that straw is the principal ingredient in straw wrapping paper, and that it is due more to such advance than to any other cause that the price of straw wrapping paper has advanced to its present market price.

This affiant further says that what is known as "Bogus Manilla" or "Butchers' Manilla" has fallen in price within the last two days five dollars per ton, and that the market for said manilla is very weak; and that the present high price of said Bogus Manilla or Butcher's Manilla is now largely due to a combination between manufacturers of that grade of paper, and that the market price is liable to break still further and Bogus Manilla paper come into serious competition with straw paper.

This affiant further says that he is personally acquainted with the affairs of the Columbia Straw Paper Company, and knows intimately many of its mills, and that he is of the opinion that the possibility of selling said mills to advantage will be greatly diminished if the sale is not made promptly, in order to take advantage of the present improved general commercial conditions throughout the country, as it is uncertain how long such conditions as affecting the straw paper industry will last, and inasmuch as the straw paper industry is at all times uncertain and subject to constant changes.

This affiant further says that in his judgment the sooner the properties are sold the better will be the

results for the mortgaged estate, as the constant rusting out and deterioration of the mill machinery and properties, that is, those which are not rentable, is constantly rendering them less and less likely to produce anything at the mortgage sale, and those that are rentable are more desirable while the industry is profitable, than when the industry is depressed and paper cannot be marketed at cost, as has happened frequently in the course of the straw paper trade.

WM. D. HOLLIS.

STATE OF ILLINOIS }
Cook County. } ss.

I, HENRY G. MILLER, JR., a Notary Public in and for said county, in the state aforesaid, do hereby certify that the foregoing affidavit was subscribed and sworn to before me by the above named William D. Hollis, this fifth day of April, 1900, and that I am duly authorized by the laws of the State of Illinois to administer oaths.

HENRY G. MILLER, JR.
Notary Public.

[SEAL.]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1899.

CASE NO. 16,724. TERM NO. 33,

HARRY W. DICKERMAN, Trustee, *et al.*

vs.

THE NORTHERN TRUST COMPANY, ET AL.

On Writ of *Certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit.

STATE OF ILLINOIS, } ss.
County of Cook. }

HENRY M. WOLF, being first duly sworn on oath, deposes and says that he has read the printed affidavits of John E. West, Henry S. Carroll and John B. Sherwood, dated respectively March 17, March 19 and March 20, 1900, and also the letter of George P. Jones, Receiver, to Otto Gresham, dated March 14, 1900, all of which are attached to the petition for rehearing in the above entitled cause.

Affiant further says that he is familiar with the litigation in question; that he is also familar with the financial affairs of the mortgaged estate since it has been in the hands of said Receiver; that in said letter from said Receiver it appears that fifteen of the properties are rented at a monthly rental of $2,100, making total receipts for the year of $25,200, and the Receiver's estimate of expenses for the same period is $22,600, but that said estimate does not pretend to include the payment to the Receiver of any sum for services. And this affiant further says that he understands that said Receiver is claiming payment for his services at the rate of $5,000 per year, and that said

claim for services does not include any claim on the part of the attorneys of said Receiver, for services rendered in and about the said mortgaged estate, and that consequently the estimate of the Receiver, assuming that he should be allowed but $3,000 a year for his compensation, would make the total expenses for the present year, not less than $25,600., or $400. in excess of the total estimated receipts; that said deficiency will be further increased by the amount of compensation which may be allowed to the Receiver's attorneys.

This affiant further says that never since the estate has been in the hands of said Receiver has the annual income, including moneys received for insurance of mills that have been destroyed by fire, equalled the annual expenses and that said Receiver has borrowed a large sum of money which said Receiver says is over $50,000 toward defraying the expenses of the receivership. So far as fires since the Receiver's appointment are concerned, all or nearly all insurance moneys amounting to many thousand dollars have been collected by the Receiver and used by him in defraying receivership expenses. The moneys for these fires have not, as stated by Mr. Sherwood in his affidavit, been paid to the Northern Trust Company.

This affiant further says that he has had reports from time to time with respect to the condition of the remaining plants comprised in the said estate; that none of said plants has at any time since the beginning of this suit (January 24 1895) been leased; that the buildings have not been occupied and the machinery has not been operated, and as a consequence both buildings and machinery have been deteriorating in value and will continue to deteriorate through non-usage, and that one of the reasons why said plant cannot be leased at this time is because of the great expense that would necessarily be caused in putting them into such condition that they could be used; that in several instances said plants were operated by water power con-

nected therewith, and during the winter and spring seasons the dams and other improvements have been partly destroyed and washed out, and that unless funds are obtained for the purpose of restoring said damaged parts, the water power rights may be wholly destroyed or injured to such an extent that they will be practically valueless.

This affiant further states that the Receiver has no funds with which to make such improvements.

This affiant further says that he has had numerous conferences with the counsel for the respondents herein, and that the minimum estimate of said counsel for Receiver's indebtedness, court costs, services of trustees, solicitors, Receiver and other expenses attending the sale of the mortgaged estate, aggregates $150,000.00.

This affiant further says that under the law respecting redemption of real estate from sale under mortgage foreclosure, in the State of Illinois, where by far the most valuable properties of the estate are located, there is allowed to the defendant and others, fifteen months for redemption, from the time of the sale, and that the statutes of the states of Michigan, Indiana, Iowa and Kansas, in which some of the properties of the estate are located, also provide for periods of redemption, and that during such period of redemption the title of said properties cannot be made perfect in any purchaser.

This affiant further says that he does not know whether or not the said John B. Sherwood was in fact informed that an alleged underwriting agreement had been exhibited and seen by parties in the City of Chicago, since January 22, 1900, but this affiant says that he was in fact familiar with many of the matters in respect to the organization of said Columbia Straw Paper Company, and that this affiant personally never saw and never heard of any such agreement, and that he is confident if any such agreement had in fact ever existed, that it would certainly have been brought to the attention of this affiant in

some manner at some time. And this affiant further says that he never heard of the claim that such an underwriting agreement existed, prior to the time that such a claim was set up by the petitioners during the progress of this litigation.

HENRY M. WOLF.

STATE OF ILLINOIS, }
Cook County, } ss.:

I, FRED W. RAYMOND, a notary public in and for said county, in the state aforesaid, do hereby certify that the foregoing affidavit was subscribed and sworn to before me by the above-named Henry M. Wolf, this fifth day of April, 1900, and that I am duly authorized by the laws of the State of Illinois to administer oaths.

FRED W. RAYMOND,
Notary Public.

[SEAL.]